

NO. _____

IN THE
Supreme Court of the United States

ROBERTO HERNANDEZ-ALDAMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4763

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO HERNANDEZ-ALDAMA, a/k/a Carlos Aldama, a/k/a Milton Ballardo-Ulvera, a/k/a Abel Camps, a/k/a Yonny Campos, a/k/a Felix Garcia-Agosto, a/k/a Jesus Gonzalez, a/k/a Robert Hernandez, a/k/a Carlos Mesa, a/k/a Roberto Olvera, a/k/a Milton Ulvera,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Terrence W. Boyle, District Judge. (7:18-cr-00124-BO-1; 7:18-cr-00123-BO-3)

Submitted: January 28, 2022

Decided: April 14, 2022

Before HARRIS and RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Vacated and remanded for resentencing by unpublished per curiam opinion.

ON BRIEF: Anne Margaret Hayes, Cary, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Evan Rikhye, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

Appellant Roberto Hernandez-Aldama appeals a 180-month sentence that was imposed after he pleaded guilty to (1) illegal reentry of an alien removed subsequent to a felony conviction, in violation of 8 U.S.C. § 1326(a), (b)(1); and (2) conspiracy to distribute and possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 and 846. On appeal, Hernandez-Aldama asserts the district court procedurally erred by (1) calculating his Sentencing Guidelines offense level based on a finding that his offense involved methamphetamine (actual) rather than a mixture or substance containing methamphetamine, and (2) failing to explain the selected sentence and the reasons for rejecting his arguments in support of lesser sentence. We reject Hernandez-Aldama's Guidelines argument, but we vacate his sentence and remand for resentencing because the district court entirely failed to explain its reasoning.

I.

Hernandez-Aldama was charged by indictment for being found in the United States on or about March 26, 2018, after being deported and without consent of the Attorney General to reapply for admission, in violation of 8 U.S.C. § 1326(a), (b)(1). A law enforcement investigation revealed that Hernandez-Aldama had been previously deported from the United States on a number of occasions. Shortly thereafter, Hernandez-Aldama was charged by superseding indictment with conspiring to distribute and possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 and

846. He pleaded guilty to both offenses without plea agreements. The two cases were consolidated for sentencing.

A probation officer prepared a presentence investigation report (PSR) prior to the sentencing hearing. On the illegal reentry charge, the probation officer calculated a base offense level of 8 and then added a 4-level increase for committing the offense after sustaining a previous illegal reentry conviction and another 4-level increase because Hernandez-Aldama had a felony record prior to his first deportation. Thus, Hernandez-Aldama had an adjusted offense level of 16. On the conspiracy charge, the probation officer attributed to Hernandez-Aldama 12.26 kilograms of cocaine, 472.0 grams of heroin, and 907.2 grams of methamphetamine (actual), for a total converted drug weight of 21,068 kilograms of marijuana and a base offense level of 34.

Based on these determinations, the probation officer arrived at an adjusted offense level of 34 but allowed a 3-level reduction for acceptance of responsibility, for a total offense level of 31. Hernandez-Aldama's criminal history score of 12 placed him in criminal history category V. His Guidelines range sentence was 168 to 210 months' imprisonment.

Hernandez-Aldama filed a written objection to the PSR,¹ asserting that the methamphetamine attributed to him should be treated as a mixture or substance containing

¹ Regarding his criminal history, Hernandez-Aldama also objected to the assessment of criminal history points for the three convictions obtained in 2002, 2003, and 2007 on the theory that they occurred more than 10 years before the dates alleged for the charged offenses. These objections are not at issue in this appeal.

methamphetamine, rather than actual methamphetamine, because the government never tested the drug.² When calculating a converted drug weight³ under the Sentencing Guidelines, one gram of methamphetamine (actual) or Ice⁴ equates to twenty kilograms of converted drug weight, while a mixture or substance containing methamphetamine equates to just two kilograms of converted drug weight. U.S.S.G. § 2D1.1, n.8(D). Although the probation officer conceded that there was no laboratory report to establish the purity level of the methamphetamine, the probation officer nevertheless rejected Hernandez-Aldama's objection. The officer stated that the substance was designated as Ice, or methamphetamine (actual), based upon two factors: (1) the co-conspirators repeatedly referred to it as Ice; and (2) the substance came from Mexico, and according to the case agent, methamphetamine produced in Mexico is typically of a 95 percent purity level or higher.

During his sentencing hearing, Hernandez-Aldama reiterated the objection that, because the methamphetamine attributed to him was never seized or tested, the district

² Treating the drugs as “methamphetamine (actual)” instead of a substance containing methamphetamine increased Hernandez-Aldama’s Guidelines range from 140–175 months to 168–210 months.

³ Under the Guidelines, ““converted drug weight’ . . . refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary [USSG § 2D1.1 cmt. (n.8(D))] . . . to determine the offense level . . . when combining differing controlled substances.” U.S.S.G. § 2D1.1(c), n.K (2018).

⁴ The drugs are legally distinct. ““Methamphetamine (actual)’ refer[s] to the weight of the [methamphetamine], itself, contained in the mixture or substance.” U.S.S.G. § 2D1.1(c), n.B. ““Ice . . . means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.” U.S.S.G. § 2D1.1(c), n.C. However, they have the same converted drug weight. U.S.S.G. § 2D1.1, cmt. n.8(D) (Drug Conversion Tables).

court should default to the lower Guidelines range for a substance containing methamphetamine rather than methamphetamine (actual). The government called a law enforcement officer to testify that (1) methamphetamines from Latin America are mostly Ice; (2) agents recorded a phone call in which Hernandez-Aldama negotiated selling Ice; (3) a confidential informant admitted purchasing Ice from Hernandez-Aldama's co-conspirator; (4) Hernandez-Aldama's co-conspirator stated that Hernandez-Aldama claimed to be able to get ten bags of Ice twice a month; (5) Hernandez-Aldama's co-conspirator admitted that Hernandez-Aldama's group was trafficking Ice; and (6) an associate of Hernandez-Aldama's co-conspirator sold an undercover officer a substance that lab testing confirmed was Ice. The district court overruled Hernandez-Aldama's objection, finding by a preponderance of the evidence that the drugs were "methamphetamine actual." J.A. 54.

Hernandez-Aldama argued for a total sentence of 120 months, asking the district court to consider that all of his prior convictions were more than ten years old, the addition of two criminal history points for being on supervised release at the time of the offense was based on a technicality, the drug quantity attributed to him overrepresented the seriousness of the offense, and he had never previously served a long prison sentence. The government argued for a total sentence of 200 months, asking the court to consider that Hernandez-Aldama's Guidelines were correctly calculated, he had repeatedly returned to the United States to commit crimes, and he is a danger to the public.

The district court originally imposed a sentence of 180 months for each offense. The court did not provide an explanation of the sentence nor respond to any of defense

counsel's arguments for a lesser sentence. The district court later went back on the record, apparently in the absence of counsel or Hernandez-Aldama. The court reduced the 180-month sentence on the immigration offense to 120 months to conform with the statutory maximum sentence. The concurrent 180-month sentence on the cocaine conspiracy offense remained intact. Hernandez-Aldama timely appealed, contending that the district court procedurally erred.

II.

When reviewing whether a district court erred in calculating a defendant's Sentencing Guidelines range, this Court reviews factual findings for clear error and legal conclusions de novo. *United States v. Shephard*, 892 F.3d 666, 670 (4th Cir. 2018). “[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole.” *United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) (internal quotation marks omitted).

At sentencing, the government has the burden of proving uncharged conduct by a preponderance of the evidence. *United States v. Grubbs*, 585 F.3d 793, 798–99 (4th Cir. 2009); *see also Morelos v. United States*, 709 F.3d 1246, 1251 (8th Cir. 2013) (“The government, for sentencing purposes, bears the burden to prove drug type by a preponderance of the evidence.” (citation omitted)). In evaluating the evidence, the district court “may give weight to any relevant information before it, including uncorroborated hearsay, provided that the information has sufficient indicia of reliability to support its

accuracy.” *United States v. Williamson*, 953 F.3d 264, 273 (4th Cir. 2020) (internal quotation marks omitted), *cert. denied*, 141 S. Ct. 638 (2020).

III.

Hernandez-Aldama challenges his sentence on two grounds. He contends that the district court procedurally erred by (1) calculating his Guidelines offense level based on a finding that his offense involved methamphetamine (actual), rather than a mixture or substance containing methamphetamine, and (2) failing to explain its selected sentence and the reasons for rejecting his arguments in support of a shorter sentence. We disagree with his first argument, but accept his second.

A.

Hernandez-Aldama contends that the district court should only have attributed to him a substance containing methamphetamine. He argues that during his sentencing hearing, the government offered no evidence about the drugs being methamphetamine (actual), but instead offered testimony that the drugs were Ice. The record reflects that the government and district court used the terms “methamphetamine (actual)” and “Ice” interchangeably. While the drugs are legally distinct, methamphetamine (actual) and Ice have the same converted drug weight. U.S.S.G. § 2D1.1, cmt. n.8(D) (Drug Conversion Tables). So, any imprecise language the government or district court used had no impact on the converted drug weight or Hernandez-Aldama’s offense level. Thus, we reject this argument.

Hernandez-Aldama next argues that there was insufficient evidence to support a finding that the methamphetamine was Ice because the methamphetamine was never seized or tested. We reject this argument, as well. In order to establish the converted drug weight here, all the government had to prove was that the methamphetamine in question was Ice, meaning “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.” U.S.S.G. § 2D1.1(c), n.C. After this case was initially calendared for oral argument, this Court expounded on the type of evidence required to establish that a conspiracy involved Ice. *See United States v. Williams*, 19 F.4th 374, 379–84 (4th Cir. 2021). In *Williams*, the Court held that drugs need not necessarily be seized and tested to prove they are Ice—even though such tests may provide “the best evidence” of the substance’s nature. *Id.* at 380. Instead, we held “the district court must have latitude to consider whatever reliable evidence is available to make its 80% purity determination.” *Id.* The district court can consider, for example, “evidence of a drug’s source, price and appearance as well as statements or testimony by co-conspirators, users or dealers.” *Id.* “However, while such evidence may be used, it must be sufficiently reliable and specific that it actually supports the government’s position that the drug’s purity is 80% or above.” *Id.*

Id.

Under the standard set forth in *Williams*, the evidence here was sufficient for the district court to find by a preponderance of the evidence that Hernandez-Aldama’s methamphetamine was Ice. Like in *Williams*, the evidence presented to the district court included statements from co-conspirators that the drugs were Ice and evidence about the drugs trafficked in the region. *Id.* at 380–81. The government also submitted evidence

that Hernandez-Aldama himself referred to the drugs as Ice. Thus, the district court’s determination that the drugs were Ice was not clearly erroneous. We therefore affirm the district court’s rejection of Hernandez-Aldama’s argument that the Guidelines for a substance containing methamphetamine should apply.

B.

Hernandez-Aldama next argues that the district court erred in failing to explain the selected sentence and its reasons for rejecting Hernandez-Aldama’s arguments in support of a lesser sentence. We agree with this argument.

“When rendering a sentence, the district court must make an individualized assessment based on the facts presented and must state in open court the particular reasons supporting its chosen sentence.” *United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019) (internal quotation marks and citation omitted). The court also “must address the parties’ nonfrivolous arguments in favor of a particular sentence, and if the court rejects those arguments, it must explain why in a sufficiently detailed manner to allow this Court to conduct a meaningful appellate review.” *United States v. Blue*, 877 F.3d 513, 519 (4th Cir. 2017).

Here, the district court did not explain its reasons for imposing the selected sentence or explain why it rejected Hernandez-Aldama’s nonfrivolous arguments in support of a lesser sentence. The entirety of the district court’s comments are as follows:

All right. The two cases, Count I of 124 and Count I of 123, a sentence of 180 months concurrent in each case is imposed. Supervised release of three years on Count I in 124, and five years on Count I in 123 are imposed. He’s not to violate any federal, state, or local law. I won’t make a recommendation

as to his location. He is given credit for time served. And he can appeal that to the Court of Appeals.

J.A. 62. And when the government asked the district court to “state if there was any miscalculation, that this was a sufficient sentence in the alternative,” the court said “I’ll make that finding, that if the Guidelines aren’t adequately developed, I would have made a variance sentence of 180 months as I think under 3553(a) it’s essential and appropriate and consistent with the sentencing goals of the Statute and the Supreme Court.” J.A. at 62–63. The district court did not provide any further explanation. We find that the district court clearly failed to adequately explain the sentence.

The district court also erred by failing to explain why it rejected Hernandez-Aldama’s arguments in support of a lower sentence. Regarding his base offense level, Hernandez-Aldama presented two bases for finding that the drug quantities attributed to him overstated the seriousness of his offense. First, he argued that, on one occasion, his co-conspirators doubled the weight of three kilograms of cocaine by diluting it, and yet he was held accountable for the full six-kilogram weight that resulted. Second, he argued that the methamphetamine attributed to him was never recovered, and the government suspected it existed based only on a co-conspirator’s claims. Hernandez-Aldama also presented arguments about his criminal history and asserted that adequate deterrence could be achieved by a 10-year sentence. The district court did not acknowledge these arguments, let alone provide any reasons for dismissing them. The district court’s rationale must appear in the record as this Court “may not guess at the district court’s rationale”

United States v. Torres-Reyes, 952 F.3d 147, 151 (4th Cir. 2020) (citation omitted).

The government concedes that the district court procedurally erred here but asks this Court to remand only for “the district court to provide reasons for the sentence and explain why it rejected Hernandez-Aldama’s arguments for a lower sentence.” Resp. Br. at 17–18. This is not the appropriate remedy. We have repeatedly held that the appropriate remedy for this error is to vacate the sentence and remand for resentencing. *See, e.g., United States v. Webb*, 965 F.3d 262, 271–72 (4th Cir. 2020); *Provance*, 944 F.3d at 218–20; *Blue*, 877 F.3d at 521–22.

IV.

Thus, for the above reasons, Hernandez-Aldama’s sentence is

VACATED AND REMANDED FOR RESENTENCING.

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA) JUDGMENT IN A CRIMINAL CASE
v.)
Roberto Hernandez-Aldama) Case Number: 7:18-CR-123-3BO/7:18-CR-124-1BO
) USM Number: 06286-196
) R. Andrew McCoppin
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1s and 1

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|--|--|----------------------|--------------|
| 21 U.S.C. § 841(a), 21 U.S.C. § 841(b)(1)(A) | Conspiracy to Distribute and Possess With Intent to Distribute 5 Kilograms or More of Cocaine. | January 15, 2019 | 1s |
| 8 U.S.C. § 1326(a), 8 U.S.C. § 1326(b)(1) | Illegal Reentry of an Alien Removed Subsequent to a Felony Conviction. | March 26, 2018. | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) Original Indictment in 7:18-CR-123-3 is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/2/2019
Date of Imposition of Judgment


Signature of Judge

Terrence W. Boyle, Chief US District Judge
Name and Title of Judge

10/2/2019
Date

DEFENDANT: Roberto Hernandez-Aldama
CASE NUMBER: 7:18-CR-123-3BO/7:18-CR-124-1BO

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

7:18-CR-124-1BO - 120 months
7:18-CR-123-3BO - 180 months - concurrent with the sentence in 7:18-CR-124-1BO.
The defendant shall receive credit for time served while in federal custody. (both cases)

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Roberto Hernandez-Aldama

CASE NUMBER: 7:18-CR-123-3BO/7:18-CR-124-1BO

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

7:18-CR-123-3BO/7:18-CR-124-1BO - 5 years per count, concurrent.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Roberto Hernandez-Aldama

CASE NUMBER: 7:18-CR-123-3BO/7:18-CR-124-1BO

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Roberto Hernandez-Aldama

CASE NUMBER: 7:18-CR-123-3BO/7:18-CR-124-1BO

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall consent to a warrantless search by a United States Probation Officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall support the defendant's dependent(s) and meet other family responsibilities.

DEFENDANT: Roberto Hernandez-Aldama

CASE NUMBER: 7:18-CR-123-3BO/7:18-CR-124-1BO

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-------------------------|-------------|--------------------|
| TOTALS | \$ 200.00 | \$ | \$ | \$ |

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss**</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|---------------------|----------------------------|-------------------------------|
|----------------------|---------------------|----------------------------|-------------------------------|

| | | |
|---------------|---------------|---------------|
| TOTALS | \$ _____ 0.00 | \$ _____ 0.00 |
|---------------|---------------|---------------|

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Roberto Hernandez-Aldama

CASE NUMBER: 7:18-CR-123-3BO/7:18-CR-124-1BO

SCHEDE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Payment of the special assessment shall be due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

* * * * * * * * * * * * * * * * *
UNITED STATES OF AMERICA, * CIVIL NO. 7:18-CR-0123 and
0124 * OCTOBER 2, 2019 2:07 P.M.
Plaintiff, * SENTENCING HEARING
*
VS. *
*
ROBERTO HERNANDEZ-ALDAMA, * Before:
* HONORABLE TERRENCE W. BOYLE
* UNITED STATES DISTRICT JUDGE
Defendant. * EASTERN DISTRICT OF NC
CAROLINA
* * * * *

APPEARANCES:

For the Plaintiff: BRADFORD KNOTT, AUSA
United States Attorneys Office
Eastern District of North Carolina
150 Fayetteville Street, Ste. 2100
Raleigh, NC 27601

For Defendant Roberto Hernandez-Aldama:

R. ANDREW MCCOPPIN, ESQUIRE
McCoppin & Associates
1250 SE Maynard Road, Ste. 202
Cary, NC 27511

Court Reporter: Michele E. Becker, RMR, CRR, RPR
United States Court Reporter
201 Magnolia Street
Spartanburg, SC 29306
(864) 905-8888

(Interpreter Javier Castillo was duly sworn.)

Proceedings recorded by mechanical stenography,
transcript produced by computer.

Michele E. Becker, RMR, CRR, RPR
United States District Court

1 (Court convened at 2:07 p.m.)

2 (Proceedings were held but not transcribed at this time.)

3 MR. KNOTT: Good afternoon, Judge.

4 THE COURT: Good afternoon.

5 Why do I have two files on this guy?

6 MR. KNOTT: I'm sorry?

7 THE COURT: I have two files on this guy.

8 Does he have multiple --

9 MR. KNOTT: Yes, sir. One of the cases is an
10 immigration case that was indicted by Mr. Kielmanovich of
11 our office when he was arrested with the drugs. It was
12 done unbeknownst to the drug section. And then when we got
13 the drug case at a later date, we indicted him along with
14 his two co-defendants for the drug conspiracy.

15 THE COURT: But he's only going to get one
16 sentence, right?

17 MR. KNOTT: Correct.

18 MR. MCCOPPIN: Yes, Your Honor.

19 THE COURT: So, he's got two PSRs, but the
20 168 to 210 is the range in each of them.

21 MR. MCCOPPIN: That's what I understand
22 Probation is recommending.

23 PROBATION OFFICER: Yes, Your Honor. That is
24 correct. There's one presentence report, but it has both
25 case numbers on there.

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1 THE COURT: Mr. Hernandez, do you want to say
2 anything about your sentence?

3 THE DEFENDANT: No, sir.

4 THE COURT: His guideline is at 31, Category
5 5. Do you have any objections to that?

6 MR. MCCOPPIN: Yes. I have some objections
7 that appear at the end of the presentence report.

10 MR. MCCOPPIN: Thank you, Your Honor.

11 || THE COURT: -- if they affect it.

12 MR. MCCOPPIN: The first objection relates to
13 Paragraph 39. There's a co-defendant named Edwin. He was
14 previously sentenced to a term of imprisonment of, I
15 believe, 38 months on this exact same case, on these exact
16 same drug quantities. Edwin, the co-defendant, alleges
17 that there were a quantity of methamphetamine that was
18 possessed by this group of people. Unfortunately, law
19 enforcement was never able to seize that, and so there's a
20 question related to the purity of that methamphetamine and
21 whether it would be considered ICE under the guidelines or
22 a substance containing a detectable amount of
23 methamphetamine. I would submit, as Defendant's counsel,
24 that without proof that it was ICE, Probation should defer
25 to the lower guideline range for substance including a

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1 detectable amount of methamphetamine.

2 THE COURT: What do you say?

3 MR. KNOTT: Well, Your Honor, I have a
4 witness who's prepared to testify. And in regards to
5 whether or not we have to prove its purity, this is a
6 preponderance standard. The Court certainly needs no
7 education about where methamphetamine comes from. The
8 majority of cases in today's court that come from Mexico,
9 ICE that comes from Mexico, it is not in any way, shape or
10 form a mixture and substance. It is by far and away ICE
11 stripped with amphetamine. These individuals were large
12 scale traffickers. They were down at the border. They
13 were caught bringing multiple kilograms of cocaine and half
14 a kilogram of heroin back into Wilmington, North Carolina.

15 Given that, Your Honor, the Government
16 believes that there is a sufficient basis to find that it
17 was likely ICE that they were possessing. It is a
18 preponderance standard, but in an abundance of caution,
19 Your Honor, we do have an agent here who can testify.

20 THE COURT: Well, go ahead and put your agent
21 on.

22 MR. KNOTT: United States calls Ms. Rhonda
23 Medlin to the stand.

24 THE CLERK: Please raise your right hand.

25 Do you swear that the testimony that you give

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1 to this Court will be the truth and nothing but the truth
2 so help you God?

3 THE WITNESS: I do.

4 THE CLERK: Please have a seat in the witness
5 box.

6 DIRECT EXAMINATION

7 BY MR. KNOTT:

8 Q Good afternoon, ma'am.

9 A Good afternoon.

10 Q Can you please describe your duties and your
11 place of employment for the Court.

12 A I'm employed with the Sampson County
13 Sheriff's Office. I'm also a Task Force DEA.

14 Q Do you investigate a large number of
15 methamphetamine crimes in the Eastern District of North
16 Carolina?

17 A Yes, sir.

18 Q And are the predominant number of those
19 cases, ma'am, that pertain to Latin America, South America
20 drug traffickers; are they ICE or a mixture or substance of
21 methamphetamine?

22 A They're ICE.

23 Q And describe the difference between the two.

24 A ICE is almost a hundred percent. You'll have
25 the high 90 percentile range in ICE where a mixture is a

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1 lower percentile. It's mixed, and you'll have it in a
2 powdery-like form.

3 Q Is the Defendant before the Court today, is
4 he tied to other individuals outside of this charged
5 conspiracy who have been indicted for methamphetamine
6 trafficking?

7 A Yes.

8 Q And can you please describe for the Court one
9 individual that's mentioned in the presentence report,
10 specifically Paragraph 8, Mr. Franz Ramos Hernandez?

11 A In 2017, we were investigating Mr. Hernandez
12 in Wilmington, in Duplin County. We were able to introduce
13 an undercover officer who purchased about a
14 pound-and-a-half of ICE.

15 Q Was that substance confirmed to be crystal
16 methamphetamine or ICE by the DEA lab?

17 A Yes.

18 Q And was Mr. Franz Ramos Hernandez, was he
19 familiar with one of the defendants -- co-defendants in
20 this case?

21 A Yes. We had identified Hector Menocal as one
22 of his associates.

23 Q And was there any effort in this case to
24 procure ICE or methamphetamine from the individuals that
25 are charged in this conspiracy?

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1 A Yes, we did.

2 Q And describe those events for the Court.

3 A Sampson County Sheriff's Office developed a
4 confidential informant who had made contact with Hector
5 Menocal who was -- he was buying cocaine and ICE from
6 Mr. Menocal. At the time, Menocal was out of state, and so
7 the CS -- the CS was making controlled phone calls to
8 Menocal, and ultimately we intercepted Mr. Aldama on that
9 same phone call conversation where they were negotiating
10 them mailing ICE through the mail to the CSs.

11 Q So, did the confidential informant
12 specifically order actual methamphetamine or ICE from this
13 group?

14 A He did, yes.

15 Q And did the confidential informant have
16 previous experience with this conspiracy or the
17 co-conspirators in procuring ICE and methamphetamine?

18 A Yes. He admitted to purchasing cocaine from
19 Mr. Menocal and also purchasing two ounces of ICE from
20 Mr. Menocal.

21 Q In regards to Menocal, have you spoken to him
22 about these substances, specifically ICE/methamphetamine?

23 A Yes.

24 Q And did he make an admission that his
25 organization was trafficking ICE or methamphetamine?

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1 A Yes.

2 Q And did he identify in those recorded phone
3 calls the Defendant, Mr. Aldama, as the individual who was
4 negotiating the price of the ICE with the confidential
5 source?

6 A Yes. Mr. Menocal identified Mr. Aldama's
7 voice as well as Mr. Fuentes identified his voice.

8 Q Lastly, ma'am, did Mr. Fuentes, the other
9 co-defendant, did he also identify methamphetamine as being
10 trafficked by this organization?

11 A Yes.

12 MR. KNOTT: No further questions at this
13 time.

14 THE COURT: Do you have any questions?

15 MR. MCCOPPIN: Very briefly, Your Honor.

16 CROSS EXAMINATION

17 BY MR. MCCOPPIN:

18 Q Agent, the methamphetamine that was acquired
19 and represents 907.2 grams in this case was acquired in
20 Arizona; is that correct?

21 A It was not acquired, to my knowledge, the
22 900 grams.

23 Q Let me restate that. The presentence report
24 makes it pretty clear that assuming that the co-defendant
25 was truthful, the methamphetamine that was allegedly

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1 acquired by this Defendant was largely consumed by these
2 defendants as they waited for over a month in Arizona;
3 isn't that correct?

4 A We had ordered 11 ounces that was supposed to
5 be mailed to the CS. I don't know if it didn't make it
6 into the product or if it was stolen somewhere while it was
7 being sent to North Carolina. And then Mr. Menocal advised
8 that he had observed a pound at one of Mr. Aldama's
9 residences where at that time Mr. Menocal advised that
10 Aldama had said he could get 10 bags twice a month of ICE.

11 Q Is it fair to say that none of the drugs --
12 that none of the methamphetamine alleged in this case was
13 ever seized by law enforcement or tested?

14 A That's correct.

15 MR. MCCOPPIN: Nothing further for the agent,
16 Your Honor.

17 THE COURT: Thank you. You may step down.

18 Well, I think that the drug weight is
19 adequately established by preponderance of the evidence.
20 This is the 907.2 grams of methamphetamine actual. I will
21 deny the objection. Any other objections?

22 MR. MCCOPPIN: Largely related to calculation
23 of the criminal history, there are three prior convictions.
24 They are noted in Paragraphs 50, 51 and 52. And whether
25 they allow Probation to count them as prior criminal

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1 history points are determined largely on when you determine
2 this Defendant is guilty of illegal reentry into the United
3 States. The indictment to which he pled guilty indicates
4 that he was found in the United States in 2018. The report
5 accurately reflects that the Defendant made a statement
6 that he returned to the United States somewhere around 2011
7 or 2012.

8 So, for Paragraphs 51, 52 and 53, in
9 measuring the ten-year period of limitation within which
10 you can count those prior criminal convictions as points in
11 today's sentencing, I would submit that the Defendant pled
12 guilty to being in the United States illegally in 2018.
13 That creates a more than ten-year range of time between
14 Paragraphs 51, 2 and 3. I'm sorry, 50, 51, 52. And
15 therefore they shouldn't give him criminal history points
16 in today's sentencing.

17 MR. KNOTT: Your Honor, I would just simply
18 direct the Court to Paragraph 23 of the probation report.
19 It states that in March of 2018, that the Defendant
20 admitted to law enforcement that he was in the United
21 States illegally, that he was knowingly so, and that he
22 re-entered the United States from his previous deportation
23 through Phoenix, Arizona or an area near Phoenix, Arizona
24 in roughly 2011 or 2012. And the law and guidelines that
25 support having a 10-year look-back period calculate from

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1 that admission. He was charged with being in the United
2 States in 2018, illegally, but he admitted to re-entering
3 illegally in 2011 or '12. That is the look-back of the
4 Government's position that the Court should factor whether
5 or not these previous convictions are appropriately scored.
6 If the Court does find that persuasive, Your Honor, then
7 clearly these paragraphs that Mr. McCoppin has mentioned
8 fall within the ten-year look-back period, and we believe
9 that they are appropriately scored. Thank you.

10 THE COURT: I agree with the Government by
11 the preponderance of the evidence that they've established
12 that 50, 51 and 52 are properly scored based on his prior
13 entry into the United States.

14 Do you have any other objections?

15 MR. MCCOPPIN: The last one is to criminal
16 history. In Paragraph 54, the Defendant was convicted of
17 illegal reentry into the United States. He was deported in
18 2006. After he was deported, the Government filed a
19 violation of his supervised release that remained unserved
20 for approximately five years and was later dismissed. So,
21 that period of time extended the period of time within
22 which this offense could be counted to determine whether
23 the Defendant was under a prior sentence of probation or
24 incarceration at a time he committed this new offense. If
25 the Defendant returned to the United States in November of

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1 2012, he would not have been under supervision or a prior
2 conviction. Aside from the fact that there was an
3 extension by the Government of this supervised release
4 extension for five years with no opportunity for the
5 Defendant to be served because he was previously deported.
6 This is an additional two points in the criminal history.
7 It makes a difference whether he's a 5 or a 4. And so
8 that's why I bring it to the Court's attention. Even if
9 you look to the Government's anticipated argument that he
10 entered the United States in 2011 or 2012, he could have
11 arrived in November or December of 2012, and therefore not
12 have been subject to that two-point enhancement in
13 Paragraph 56.

14 THE COURT: What do you say?

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1 release for 12 months and then through September of 2012.

2 So, I think it's appropriately scored.

3 THE COURT: Thank you. What do you say?

4 PROBATION OFFICER: I believe it's
5 appropriately scored, Your Honor.

6 THE COURT: It's what?

7 PROBATION OFFICER: I believe it's
8 appropriately scored.

9 THE COURT: Okay.

10 PROBATION OFFICER: And I do not know why the
11 objection is not in the addendum. I don't know if it was
12 not provided or if we failed on our part to not put it in
13 there.

14 THE COURT: Okay.

15 MR. MCCOPPIN: I did file -- if I may, Your
16 Honor. That objection is at the top of Page 2 of the
17 objections that I filed with Document 37 on 7/30. I would
18 have a different document number on the other case.

19 PROBATION OFFICER: We failed to put it in
20 there, Your Honor.

21 THE COURT: Okay. Well, I'll include it and
22 deny the objection. Anything else?

23 MR. MCCOPPIN: Those would be my guideline
24 objections. If I could be heard further at the appropriate
25 time?

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THE COURT: Go ahead.

MR. MCCOPPIN: Thank you, Judge.

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1 three kilograms of cocaine. And then he along with the
2 other defendants cut it into six grams -- six kilograms,
3 excuse me. So, Probation has correctly calculated as being
4 a little bit over 12 kilograms. But they originally
5 purchased three, and then they cut it to make it larger.
6 The methamphetamine in this case has never been recovered.
7 The only reason we even suspected it exists is because
8 Edwin, the co-defendant, said it did. The heroin was
9 properly scored. I have no objection about that.

10 So, the question is, this person who's never
11 spent more than a year, or year-and-a-half, two years in
12 jail who admittedly comes to the United States multiple
13 times after being told not to, and convicted, and deported,
14 stands before you. Anymore time than ten years I would
15 submit is unnecessary to create a deterrent to any other
16 group of people or this Defendant in particular. Thank
17 you.

18 THE COURT: From the Government.

19 MR. KNOTT: Yes, Your Honor. The Government
20 disagrees with that assessment in regards to the
21 substance -- the substances that are before the Court.
22 These substances are a kilogram quantity level of cocaine,
23 12 kilograms, almost a half key of heroin, and almost a
24 kilogram of methamphetamine, part of which the Defendant
25 himself was recorded negotiating with a confidential

1 source. And all of this points to, in the Government's
2 opinion, Your Honor, someone who is committed not only just
3 to committing crimes, but to coming into the United States
4 repeatedly to commit crimes.

5 We're looking at this individual's history
6 and characteristics, Your Honor. He has been present here
7 illegally for a majority of his adult life. He's 38 years
8 old. Paragraphs 11 through 25 of the report detail very
9 very frequent and highly suspicious instances of the
10 Defendant reentering the United States. There are drugs
11 that are present, Your Honor. There's paraphernalia that's
12 present. There is flight from law enforcement that he
13 engaged in on numerous occasions. There were false
14 statements provided by this Defendant to law enforcement on
15 numerous occasions. There are instances that would lead us
16 to believe that he was involved in smuggling others from
17 Mexico or Latin America into the United States. I'm
18 referencing Paragraph 49 and 53. There were thousands of
19 dollars that were recovered from this individual. There
20 are fictitious identification documents that were recovered
21 from this individual. And despite all of that, Your Honor,
22 despite four years of custody, he continues to come back.
23 And based off of that recitation on top of the evidence
24 that we discussed here today, I think it's very clear that
25 he has come back to the United States to try to make money

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1 through illegal means. And when you look at the types of
2 drugs, methamphetamine and heroin predominantly on top of
3 the 12 keys of cocaine, Your Honor, this individual
4 represents a committed danger to the public, to not only
5 the folks of Eastern North Carolina, but to the folks of
6 Arizona, to the folks in every state that he has been
7 involved with. It's for those reasons that the United
8 States would be recommending a sentence of 200 months to
9 the Court. Thank you.

10 THE COURT: All right. The two cases,
11 Count I of 124 and Count I of 123, a sentence of 180 months
12 concurrent in each case is imposed. Supervised release of
13 three years on Count I in 124, and five years on Count I in
14 123 are imposed. He's not to violate any federal, state,
15 or local law. I won't make a recommendation as to his
16 location. He is given credit for the time served. And he
17 can appeal that to the Court of Appeals.

18 MR. KNOTT: Your Honor, may I request that
19 the Court state if there was any miscalculation, that this
20 was a sufficient sentence in the alternative?

21 THE COURT: I'm sorry?

22 MR. KNOTT: May I request that the Court
23 state if there is a miscalculation that this is a
24 sufficient sentence?

25 THE COURT: Oh. I'll make that finding, that

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1 if the guidelines aren't adequately developed, I would have
2 made a variance sentence of 180 months as I think under
3 3553(a) it's essential and appropriate and consistent with
4 the sentencing goals of the Statute and Supreme Court
5 opinion.

6 MR. KNOTT: Thank you, Your Honor.

7 THE COURT: We'll take a recess briefly while
8 you bring up Mr. Williams, James Williams.

9 (Proceedings were held but not transcribed at this time.)

10 THE COURT: Let me re-inquire in the
11 Hernandez case. Was his maximum punishment ten years on
12 one of those counts?

13 THE CLERK: Which one?

14 THE COURT: I gave him -- nobody raised this
15 at the time. I gave him 180 months on both charges, but I
16 think one of his charges had a ten-year cap on it?

17 PROBATION OFFICER: One of his charges has a
18 ten-year cap on it.

19 THE COURT: So, it can't be 180 months in a
20 120-month crime.

21 PROBATION OFFICER: Right.

22 THE COURT: That wasn't caught.

23 PROBATION OFFICER: That wasn't caught.

24 THE COURT: Well, it needs to be corrected on
25 the record that he gets 120 months on the ten-year crime,

1 and on the ten to life crime he gets 180 months.

2 PROBATION OFFICER: Yes, Your Honor. Thank
3 you.

4 (Proceedings were held but not transcribed at this time.)

5 (Court adjourned at 4:12 p.m.)

6

7 CERTIFICATE

8 I, Michele E. Becker, certify that the foregoing is a
9 correct transcript from the record of proceedings in the
10 above-entitled matter.

11

12 /s/ Michele E. Becker

13 Date: 11/20/2019

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